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No. 97-918

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

WESLEY HARVEY AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF AMICI CURIAE OF THE BARNES & TUCKER COMPANY, BETHENERGY MINES, INC., AND THE PENNSYLVANIA MINES CORPORATION SUBMITTED IN SUPPORT OF THE PETITIONERS

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INTRODUCTION[1]

On four previous occasions this Court has acted to preserve the basic right of coal mine operators to defend themselves in claims under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 (1988) ("the Act" or "BLBA").[2]

Coal mine operators again seek this Court's intervention to dissuade the United States Department of Labor ("DOL") from perpetuating a scheme which eliminates finality in the adjudication of black lung claims as it relates to the three primary elements of entitlement, namely: (i) total disability; (ii) caused by coal workers' pneumoconiosis; and (iii) which arose out of coal mine employment. *Mullins*, 484 U.S. at 141. The DOL avoids administrative finality by interpreting one of its regulations, 20 C.F.R. § 725.309, to create the "one element" test as referred to by the Court below, *Lovilia Coal Company and Old Republic v. Wesley Harvey and Director, OWCP*, 109 F.3d 451 (8th Cir. 1997), a test which was also adopted by the Third Circuit in *Labelle Processing Company v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995), a jurisdiction for black lung claims litigated by Amici.

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[1] In response to Rule 37.6, no counsel for a party authored this Brief, in whole or in part, nor has any monetary contribution been made to its preparation or submission, by any person or entity other than Amici Curiae.

[2] *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 (1987) ("Mullins"); *Pittston Coal Group v. Sebben*, 484 U.S. 105 (1988) ("Pittston Coal Group"); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); and *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991).

Claims litigation procedures are set forth in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) ("LHWCA"); *Greenwich*, 512 U.S. at 271; 33 U.S.C. §§ 919-922, incorporated by reference at 30 U.S.C. § 932(a). The Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988) ("APA") also applies. *Greenwich*, 512 U.S. at 271. 20 C.F.R. § 725.309 is DOL's "duplicate claims" provision which was adopted to permit a re-adjudication of a prior final denial in a multiple filing circumstance only if the new filing met the criteria for modification under § 22 of LHWCA, 33 U.S.C. § 922, or where it is found that " . . . there has been a material change in conditions." 20 C.F.R. § 725.309(c), (d).

The "one element" test is directed at how the adjudicator must assess the issue of material change. For example, a black lung claim fails if the medical evidence does not establish one of the three primary elements as noted above, namely, disease, disability or causation. Under the "one element" test a material change must be found, according to the DOL, if new medical evidence developed after the final denial establishes to the satisfaction of the fact finder any one of the three failed elements. Thereafter, the fact finder, based upon the entire record, including evidence offered in the prior denial, conducts a *de novo* review and makes a determination of entitlement on all three elements. *Labelle*, 72 F.3d at 318.

The "one element" test is clearly wrong since it has nothing to do with determining whether there has been an actual change in a miner's respiratory health as the result of his exposure to respirable coal mine dust. It impermissibly presumes; on the basis of new and possibly just different evidence before the same or a different

fact finder, that claimant can establish one element of a claim; that pneumoconiosis, in the absence of further coal dust exposure, is a latent and progressive disease and that it has, in fact, progressed to the point of disability. These presumptions are unlawful under *Greenwich*. The "one element" test not only eliminates administrative finality but, through its publication, encourages what has become the never ending refiling and relitigation of a black lung benefits claim.

INTEREST OF AMICI[3]

The Barnes & Tucker Company, BethEnergy Mines, Inc. and the Pennsylvania Mines Corporation are all business corporations and now, or in the past, active coal producers. Accordingly, they are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. § 931-945, in two direct ways: (1) as individual coal mine operator defendants,[4] 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF" or "Trust Fund"), 26 U.S.C. § 4121. Revenues

[3] Pursuant to Rule 37.3, written consents of counsel of record for all parties to these proceedings are being filed with the Clerk of this Court with this Brief.

[4] Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(2), 9501(d)(1)(B). The BLDTF also pays all administrative expenses of the Department of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

An additional and very important consideration to the actual payment of benefits to successful claimants are the costs of litigating claims which are not successful. The cost of defending a federal black lung claim through the Administrative Law Judge ("ALJ") stage, both in legal and medical development, on average is nearly $15,000.00. It is surmised that Lovilia Coal and Old Republic, Petitioners herein, incurred such costs in at least three of the five filings by Wesley Harvey as each went to an ALJ for some $45,000.00 in litigation defense costs alone. For claims managed for Amici by this office, 49 percent of these miners have filed for benefits two or more times. Unrestricted repetitive filing, in and of itself, represents significant cost.

Unless this Court grants this Petition, and properly scrutinizes the "one element" test, Amici will face unnecessary expense in the successful defense of these multiple filings, and will also face the chance of unsuccessful defense and the cost of claim payment only because of

the creation of the two unlawful burden shifting presumptions.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the Writ identified in the Petition and, as these are well articulated, their discussion here will be brief. The first is that not all circuit courts that have addressed the issue are in accord. Specifically, although the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Third Circuit in *Labelle, supra*, and the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP*, 86 F.2d 1358 (4th Cir. 1996), *en banc, cert. denied*, 117 S. Ct. 763 (1997), have, for the most part, adopted the DOL's "one element" test, the Tenth Circuit has clearly rejected it in *Wyoming Fuel Company v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996). The Seventh Circuit seems to have agreed with the "one element" test as long as there is a demonstration of an actual material change in that one element. *Peabody Coal Company v. Spese*, 117 F.3d 1001 (7th Cir. 1997).

The second reason advanced in the Petition for granting the Writ is because the "one element" test is so clearly inconsistent with enabling legislation, the APA, and prior decisions of this Court. In *Greenwich*, this Court again confirmed the applicability of the APA to federal black lung claims and held that in black lung litigation the proponent of a fact had the burden of proving it by a preponderance of the evidence. The DOL's "one element" test, without any authority, creates presumptions which

reallocate those burdens, and this reallocation is not permitted under the APA and *Greenwich*.

The "one element" test is further totally inconsistent with the basic principles of *res judicata*, which this Court has held, apply in black lung claims. *Pittston*, 488 U.S. at 122. For example, a black lung claimant could have his claim denied on the basis that, although he had a totally disabling pulmonary impairment, he did not have coal workers' pneumoconiosis, and his impairment was due to smoking cigarettes. Under the "one element" test, on his refiled claim, the claimant could accumulate new x-ray interpretations which would convince the fact finder that coal workers' pneumoconiosis did exist, and that same fact finder would then conduct a *de novo* review of all of the evidence on the issues and could, without restriction, now find as a fact that the claimant's coal workers' pneumoconiosis produced his pulmonary disability, not his cigarette smoking.

Nothing in the modification provisions of the LHWCA contemplates such a result, and the DOL identifies nothing that justifies such a result other than its own analysis of its regulation.

Finally, the Petition discusses the tremendous economic impact the "one element" test has on the mining industry. The absence of administrative finality and the resulting violation of *res judicata* means that there are a significant number of unanticipated and, accordingly, uninsured or unfunded costs. This is further enhanced by its encouragement to unsuccessful claimants to refile their claims. DOL's "one element" test is particularly troublesome to operators similarly situate to Amici. For

the most part, Amici are no longer mining coal or are, in any way, associated with the industry other than for matters such as defending these claims. There is simply no way to fund the cost of refiled claims which are barred by traditional *res judicata* but which are subject to relitigation and possible payment under the "one element" test.

Further, it is clear that the whole basis for the Federal Black Lung Program is, as appropriately anticipated, coming to a close. The Center For Disease Control has recently published data collected by the Examination Processing Branch of the Division of Respiratory Disease Studies, NIOSH, indicating that, over 20 years of the Program, the prevalence of coal workers' pneumoconiosis in miners has fallen from 11 percent to about 3 percent with the more serious types of pneumoconiosis, over a 25 year period, being reduced from 3.5 percent to approximately .5 percent in long term miners, and being nearly eliminated in persons whose coal dust exposure commenced after 1969. The Program has been successful and should end. The "one element" test, arguably, appears as nothing more than DOL's recent attempt to inject new and prolonged life into a Program, which based on the medicine and on the fundamental principles of *res judicata,* should be coming to a close.

As Amici do business within the Commonwealth of Pennsylvania, in addition to being responsible for claims under the BLBA, we must also respond to claims alleging disabling coal workers' pneumoconiosis under the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, Article I, §§ 101-601, as amended, 77 P.S. §§ 1-1066 ("PWCA"). Although the PWCA does not make specific provision for allowing or litigating refiled claims,

such claims are permitted. The way they are dealt with is so distinct from the "one element" test that it further demonstrates how wrong the test is and why this Court must intervene.

In *Robachinski v. Workers' Compensation Appeal Board*, 380 A.2d 952 (Pa. Cmwlth. 1977), the court acknowledged that the refiling of occupational disease claims must be permitted because certain diseases could be progressive in nature, and that the fundamental principles of due process were not violated because what was to be determined was a man's medical condition at a point in time after his prior claim had been denied. There must be proof that the claimant's condition was different than at the time of the denial, and the court clarified that the medical evidence must demonstrate a change in the claimant's condition from the time of the prior denial or, as a matter of law, the claim must be denied. *Kanyan v. Workers' Compensation Appeal Board (Helvetia Coal Co.)*, 557 A.2d 792 (Pa. Cmwlth. 1989), *alloc. denied*, 567 A.2d 655 (Pa. 1990). The court explains:

> [1,2] As both parties note, occupational diseases may be progressive so that the denial of one claim does not necessarily preclude the filing of subsequent claims *Sullivan Trail Manufacturing Co. v. Workmen's Compensation Appeal Board (Wetzel)*, 80 Pa. Commonwealth Ct. 144, 471 A.2d 151 (1984). Additionally, this Court has held that the manifestation of an occupational disease may also be progressive in nature and that claimants should be given the opportunity to introduce medical evidence sufficient to demonstrate whether said manifestations are progressive. *Fields v. Workmen's Compensation Appeal*

> *Board (Duquesne Light Co.)*, 114 Pa. Commonwealth Ct. 645, 539 A.2d 507 (1988), *appeal denied*, 520 Pa. 599, 552 A.2d 253 (1988). The Board here remanded to the referee to allow Claimant to prove his change in condition or manifestation of illness. Yet, Claimant's third petition substantively relied upon the same medical diagnosis given by Klemens in Claimant's prior claims. When asked if his diagnosis had changed or if Claimant's manifestation of pneumoconiosis had worsened since the previous claims, Klemens replied in the negative several times. Upon reversal and remand, the Board specifically ordered that the referee determine if there had been a change in Claimant's manifestation of pneumoconiosis that would establish Claimant's third petition as a new claim rather than a relitigation of his prior claims. *See Robachinski.* (footnotes omitted).
>
> In the instant case, the referee's finding of Claimant's partial disability was based on Klemens' medical evidence which was substantively similar to x-rays and diagnosis he had previously given and which had been denied as insufficient by two prior referees. This Court has held that such repetitive evidence is insufficient to support a referee's findings of disability. In *Sullivan*, the Court stated that if a claimant's only evidence for a second claim is based upon the medical evidence adduced at a hearing on a first claim petition which resulted in a finding of no disability, then such evidence is insufficient.

Kanyan, 557 A.2d at 794.

Amici submit that such an analysis is what "material change" is all about. Such an approach is in accord with

res judicata, administrative finality, and is accomplished without improper burden shifting presumptions.

It is noted that Pennsylvania has a further restriction in support of finality whereby the PWCA requires, in Section 301(c)(2), that disability occur within 300 weeks of the date of last exposed employment. 77 P.S. § 411. The BLBA contains no comparable provision which makes it even more important that the fundamental principles of *res judicata* be maintained. Accordingly, it is all the more important that this Court properly scrutinize the "one element" test.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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